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6  
7 IN THE UNITED STATES DISTRICT COURT  
8 DISTRICT OF ARIZONA

9 United States of America,

10 Plaintiff,

11 v.

12 Manuel Humberto Ozuna Munoz,

13 Defendant.  
14  
15  
16

Case No. 2:17-cr-1078-DGC

**MOTION TO  
DISMISS THE INDICTMENT  
BASED ON ARTICLE 31 OF THE  
UNITED NATIONS CONVENTION  
AGAINST TORTURE**

(Evidentiary Hearing Requested)

17 Excludable delay under 18 U.S.C. § 3161(h)(1)(D) may result from this motion or from  
18 an order based therein.

19 Defendant, Mr. Manuel Humberto Ozuna Munoz, by and through counsel undersigned,  
20 and under Federal Rule of Criminal Procedure, Rule 12(b)(3)(C), moves this Court to enter an  
21 Order dismissing the indictment. This request is supported by the following Memorandum of  
22 Points and Authorities.

23 RESPECTFULLY SUBMITTED: September 17, 2017.  
24

25 s/Juan L. Rocha  
26 **JUAN L. ROCHA**  
27 Attorney for Defendant  
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**I. FACTUAL BACKGROUND**

On June 14, 2017, the Immigration and Customs Enforcement (ICE) Phoenix Mobile Criminal Alien Team Unit, received information that Mr. Munoz had checked into the Motel 6 on 52nd Drive in Phoenix. They were tipped off by employees at Motel 6 that he had checked into the hotel after he had used a Mexican driver license to check into the motel. Mr. Munoz did not have any outstanding warrants nor was he committing a federal, local, or state crime, or under suspicion of having committed such a crime.

After being detained by ICE agents, he was transported to the ICE field office and fingerprinted confirming his criminal and immigration history. At that field office, ICE agents were able to determine that he had entered the county at a place other than a port of entry. During this processing, moreover, Mr. Munoz told federal agents he had re-entered the country because he was seeking refuge in the United States. He told agents that his brother had been murdered in Mexico by unknown assailants, and that Mexican police were unable to protect him, let alone bring the culprits to justice. Having no where else to turn and sensing that his brother's murders were also looking for him, he made the decision to re-enter the United States to seek refuge. He did not, however, enter the United States through the port of entry. And not knowing the law of the United States he did not immediately ask for asylum. Still, the I-213 corroborates this statement; it indicates Mr. Munoz had a credible fear of returning to the Republic of Mexico. Despite this, the government prosecuted him for violating 8 U.S.C. § 1326(a), Reentry of Removed Alien.

**II. ISSUE PRESENTED**

Mr. Munoz contends he should not be subject to penalties for entering the United States illegally when seeking asylum because such penalties violate Article 31 of the United Nations treaty relating to the status of refugees, to which the United States is a party. *See* Convention Relating to the Status of Refugees, July 28, 1951, art. 31, 19 U.S.T. 6259, 6275, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

### III. LAW AND ARGUMENT

#### A. The Government's Criminal Prosecution of Mr. Munoz For Illegal Reentry Violates Article 31 of the United Nations Convention Against Torture.

Article 31(1) of the U.N. Convention Against Torture provides as follows:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Although the United States is not a signatory to the Convention Against Torture, it is bound to comply with the Convention pursuant to its accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31. 1967, 19 U.S.T. 6223. *See INS v. Stevic*, 467 U.S. 407, 416 (1984).

#### *Argument*

Mr. Munoz contends he cannot be prosecuted for illegal reentry because he entered the United States as a refugee under the Immigration and Nationality Act (INA) and under Article 31. The United Nations Convention Against Torture defines a “refugee” as one who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, memberships of a particular social group or political opinion, is outside the country of his nationality and is unable or, or wing to such fear, is unwilling to avail himself of the protection of that country.” 19 U.S.T. at 6261. The INA more or less adopts the same definition for asylum, INA § 208, and Withholding of Removal, § 208.16.

Mr. Munoz entered the United States because his brother had been murdered and feared that his life was endanger and because Mexican police were incapable of protecting him. He therefore qualifies for certain rights and protections under international law, protections that preclude the government from prosecuting him from illegally entering the country. That he had been previously removed or has a criminal history is irrelevant. An alien may apply for asylum and withholding of removal “irrespective of such alien’s status,” 8 U.S.C. § 1158(a)(1), because

1 to deny asylum relief to a refugee that has flouted a country's border control or immigration laws  
2 because of the urgency with which he was required to leave his home country would be to  
3 penalize him for the very fact of being a refugee. *See* 8 U.S.C. § 1101(a)(42) (recognizing that  
4 refugees, by definition, are fleeing persecution); UN Ad Hoc Committee on Refugees and  
5 Stateless Persons, Memorandum by the Secretary-General, UN Doc. E/AC.32/2, Ch. XI, Art.  
6 24. Para. 2( Jan 3, 1950) ("A refugee whose departure from this country of origin is usually a  
7 flight, is rarely in a position to comply with the requirements for legal entry (possession of  
8 national passport and visa) into the country of refuge."). Prosecuting Mr. Munoz for illegally  
9 entering the country denies him the full scope of refugee protection on account of his illegal  
10 entry into the state's territory. *See* Refugee Convention, Introductory Note ("Prohibited penalties  
11 might include being charged with immigration or criminal offences relating to the seeking of  
12 asylum, or being arbitrarily detained purely on the basis of seeking asylum").

14 Here, the penalty imposed on him is in the form of a criminal charge and his current  
15 imprisonment, the very thing the Article 31 prohibits, without regard to the underlying  
16 circumstances in an alien's case. It is an impermissible penalty because the penalty was imposed  
17 before Mr. Munoz's status as a refugee could even be determined. *See e.g., U.S. v. Malenge*, 294  
18 Fed.Appx. 642, 645 (2nd Cir. 2008) ("It appears that the USAO has instead established a blanket  
19 policy of immediately prosecuting asylum seekers for their use of false documentation. This  
20 practice is troubling, to say the least.") Determining whether Mr. Munoz qualifies for asylum,  
21 withholding of removal, or relief under the Convention Against Torture, in other words, is what  
22 Article 31 requires before a decision on criminal prosecution should be made.

23 And while Mr. Munoz failed to present himself at the port of entry and request asylum  
24 as requested by Article 31, this decision in and of itself does not mean the government is allowed  
25 to criminally prosecute him. As the Second Circuit explained in *Malenge*, "[i]t is clearly  
26 preferable that refugees announce themselves to American officials as soon as they reach the  
27 border. We do not take lightly the fact that Malenge tried to enter the country by presenting false  
28

1 identification and lying to border officers. But we also recognize that some refugees, particularly  
 2 those fleeing political violence, harbor a natural distrust of government officials. \*\*\* There is  
 3 surely a more appropriate way to handle such cases, and to deter such conduct short of criminal  
 4 prosecution.” *Id.* at 645. “Many police officers are ‘involved in kidnapping, extortion, or  
 5 providing protection for, or acting directly or on behalf of, organized crime and drug traffickers,’  
 6 which leads to the “continued reluctance of many victims to file complaints.” *Madrigal v.*  
 7 *Holder*, 716 F.3d 499, 506 (9th Cir. 2013). Moreover, Mr. Munoz entered the country illegally  
 8 because he was unaware that he could safely enter legally. *See Melange*, Fed.Appx. at 645  
 9 (“This prosecution penalizes her for her ignorance, in contradiction of our government’s policy  
 10 of providing safe haven to refugees fleeing political violence and persecution. Moreover, this  
 11 prosecution appears to place this United States Attorney’s Office at odds with the Executive  
 12 Branch as a whole, which has committed, through the above-cited international agreements, to  
 13 avoid such penalties.).

14  
 15 Whether Mr. Munoz’s claim of fear is credible or viable is irrelevant to the analysis of  
 16 whether he may be criminally prosecuted for illegally entering the country under Article 31.<sup>1</sup>  
 17 Further still, any argument that Mr. Munoz will have an opportunity to ask for asylum after he  
 18 pleads guilty to § 1326(a) and after he serves his federal prison time is still violates Article 31,  
 19 since it specifically says a person cannot be prosecuted for illegally entering a territory when  
 20 looking for asylum.

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 24 <sup>1</sup> Section 235(b)(1)(B)(v) of the INA defines credible fear of persecution as: “a significant  
 25 possibility, taking into account the credibility of the statements made by the alien in support of  
 26 his or her claim and such other facts as are known to the officer, that the alien could establish  
 eligibility for asylum under Section 208 [of the INA].”

27 The implementing regulations provide that an applicant will be found to have a credible  
 28 fear of torture if the applicant demonstrates: “a significant possibility that he or she is eligible  
 for withholding of removal or deferral or removal under the Convention Against Torture,  
 pursuant to 8 CFR 208.16 or 208.17.” *See* 8 CFR 208.30(e)(3).

1 **IV. CONCLUSION**

2 For the aforementioned reasons, Mr. Munoz moves this Court to dismiss the indictment  
3 levied against him because the government's criminal prosecution of him violates Article 31 of  
4 the U.N. Convention Against Torture since he was seeking asylum when he reentered the United  
5 States. The district court should order the Department of Homeland Security to provide him an  
6 interview to present his case.

7 RESPECTFULLY SUBMITTED: September 17, 2017

8  
9 s/ Juan L. Rocha

10 **JUAN L. ROCHA**

11 Attorney for Defendant

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13 *I hereby certify that on September 17, 2014, I electronically transmitted the attached Motion*  
14 *to Suppress Evidence and Statements to the Clerk's Office using the CM/ECF System for*  
*filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrant*

15 Sheila Phillips  
16 Assistant United States Attorney

17 Copy Mailed to:

18 Mr. Munoz  
19 Defendant  
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